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# Ambank (M) Bhd v AIM Edition Sdn Bhd

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-33–07 OF 2020(B)
NALLINI PATHMANATHAN, ZABARIAH YUSOF AND MARY LIM FCJJ
2 DECEMBER 2021

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*Land Law — Auctions and auctioneers — Public auction by order of court — Appellant as chargee of land initiated judicial sale of land by way of public auction — Respondent's bid accepted — Respondent registered as owner — Respondent discovered shortfall in size of land — Respondent sued appellant for breach of contract — Whether judicial sale pursuant to s 257 of the National Land Code gave rise to contract between chargee bank and successful bidder so as to constitute cause of action — National Land Code ss 256 & 257*

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SAP Holdings Bhd as the owner of a piece of land ('the land') had entered into a joint-venture agreement with Cergas Tegas Sdn Bhd ('Cergas') to develop the land. The land was charged to the appellant in consideration of the loan facility provided by the appellant to Cergas. When Cergas defaulted on the loan repayment, the appellant had initiated proceedings for a judicial sale of the land by way of public auction. The reserved price of the land was RM120m. The respondent's bid was accepted and after signing the relevant documents and paying 10% deposit of the reserved price, the respondent was registered as the owner of the land. Problems arose when the respondent discovered that the actual size of the land did not accord with what was stated in the proclamation of sale ie 94.76 hectares because the land overlapped with five other lots where separate titles had been issued. The respondent then filed an action for breach of contract against the appellant. In defence, the appellant contended that there was no contract between the parties, and that there was no breach in the conditions of sale. The respondent's claim was dismissed by the High Court ('the HC'), but the Court of Appeal ('the COA') reversed the HC's decision, hence, the present appeal. The main issue in the present appeal was whether a judicial sale pursuant to s 257 of the National Land Code ('the NLC') gave rise to a contract between the chargee bank and a successful bidder so as to constitute a cause of action ('the question').

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**Held**, allowing the appeal with costs, setting aside the decision of the COA and reinstating the decision of the HC:

(1) Under the English system, mortgagees were equated as owner as the land was transferred to the mortgagee. Hence, when the mortgagee exercised

its right of sale, it did so as owner and was thus rightly regarded as vendor. However, that was in 1915, and the sale was conducted under the Land Enactment of 1911. Today, mortgages were not recognised under the NLC, even less the existence and principle of equitable mortgages. Hence, it was erroneous for the High Court in the case of *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 ('Malayan United Finance') to have followed and applied *Lim Beng v AVA Palaniappa Chetty* [1922] 1 FMSLR 764 and regarded a chargee as owner and thereby vendor of the charged land. The cases that have followed and applied that view including the COA's decision in the present case were thus no longer good law (see paras 57–58 & 61).

(2) The decision of the Federal Court ('the FC') in *Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd* [2016] 1 MLJ 165 ('Ranjit Singh') and the decision of the Supreme Court ('the SC') in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 ('M & J Frozen Foods') were instructive and of application. It was apparent that the cause of action and issue in *Ranjit Singh* were in fact similar to the present appeal but the COA in the present case opined that the binding decision of *Ranjit Singh* was distinguishable on the facts. This critical point, that there was no contract to begin with, was the ratio decidendi in *Ranjit Singh*, appeared to have been overlooked by the COA; and it was this principle that bound the COA under the doctrine of stare decisis and for which differences in facts did not alter that fundamental principle. Further, in *M & J Frozen Foods*, the SC held that the owner of the charged property remained the owner and his proprietary interest was not even transferred at the fall of the hammer. It was further held that the chargee was not capable of passing title of the property concerned as that remained with the owner at all times. This was the correct position, the COA therefore erred in following *Malayan United Finance* and in failing to consider the SC's decision in *M & J Frozen Foods* (see paras 24–26, 45 & 61).

(3) The court answered the question in the negative. A judicial sale pursuant to s 256 of the NLC clearly did not give rise to a contract between the chargee bank and the successful bidder such as the plaintiff who was the respondent in the present appeal. Given the fact that the remedy for an order for sale was expressly provided by statute, there was no reason or need to deploy the legal fiction of a contract. Ultimately, this was a judicial sale governed by statute and it was neither correct nor plausible to fit such a creature of statute into the confines of the Contracts Act 1950. In any event, it was evident from a perusal of the title that the respondent was the registered owner with indefeasible title to 94.76 hectares. This was consistent with what was ordered by the High Court and as set out in the proclamation of sale. The fact that other titles had been issued which

seemingly encroached on the respondent's land meant that the respondent ought to be pursuing other remedies (see paras 60 & 62–63).

**[Bahasa Malaysia summary**

SAP Holdings Bhd sebagai pemilik sebidang tanah ('tanah tersebut') telah memeterai perjanjian usaha sama dengan Cergas Tegas Sdn Bhd ('Cergas') untuk membangunkan tanah tersebut. Tanah tersebut telah dicagar kepada perayu sebagai pertimbangan untuk kemudahan pinjaman yang diberikan oleh perayu kepada Cergas. Apabila Cergas gagal membayar balik pinjaman tersebut, perayu telah memulakan prosiding untuk penjualan kehakiman ke atas tanah tersebut melalui lelongan awam. Harga rizab tanah tersebut ialah RM120 juta. Bidaan responden telah diterima dan selepas menandatangani dokumen-dokumen yang berkaitan dan membayar deposit 10% daripada harga rizab, responden telah didaftarkan sebagai pemilik tanah tersebut. Masalah timbul apabila responden mendapati bahawa saiz sebenar tanah tidak sama dengan apa yang dinyatakan dalam proklamasi jualan iaitu 94.76 hektar kerana tanah tersebut bertindih dengan lima lot lain di mana hakmilik berasingan telah dikeluarkan. Responden kemudiannya memfailkan tindakan pelanggaran kontrak terhadap perayu. Dalam pembelaan, perayu berhujah bahawa tiada kontrak antara pihak-pihak, dan tiada perlanggaran dalam syarat-syarat penjualan. Tuntutan responden telah ditolak oleh Mahkamah Tinggi ('MT'), tetapi Mahkamah Rayuan ('MR') membatalkan keputusan MT, justeru, rayuan semasa. Isu utama dalam rayuan ini ialah sama ada penjualan kehakiman menurut s 257 Kanun Tanah Negara ('KTN') telah mewujudkan kontrak antara bank pemegang cagaran dan pembida yang berjaya sehingga membentuk satu kausa tindakan ('persoalan tersebut').

**Diputuskan**, membenarkan rayuan dengan kos, mengenepikan keputusan MR dan mengembalikan semula keputusan MT:

(1) Di bawah sistem Inggeris, pemegang gadaian disamakan sebagai pemilik kerana tanah telah dipindahkan kepada pemegang gadaian. Oleh itu, apabila pemegang gadaian melaksanakan hak jualannya, ia berbuat demikian sebagai pemilik dan dengan itu wajar dianggap sebagai penjual. Walau bagaimanapun, keadaan tersebut adalah pada tahun 1915, dan penjualan tersebut telah dijalankan di bawah Enakmen Tanah 1911. Pada ketika ini, gadaian tidak diiktiraf di bawah KTN, malahan kewujudan dan prinsip gadaian saksama sudah semakin kurang. Oleh itu, Mahkamah Tinggi telah terkhilaf dalam kes *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 ('Malayan United Finance') apabila mengikuti dan mengguna pakai *Lim Beng v AVA Palaniappa Chetty* [1922] 1 FMSLR 764 dan menganggap pemegang cagaran sebagai pemilik dan dengan itu penjual tanah yang dicagar. Oleh yang demikian, kes-kes yang telah mengikuti dan mengguna pakai pandangan tersebut termasuklah keputusan MR dalam kes ini bukan lagi

undang-undang yang baik (lihat perenggan 57–58 & 61).

(2) Keputusan Mahkamah Persekutuan ('MP') dalam *Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd* [2016] 1 MLJ 165 ('Ranjit Singh') dan keputusan Mahkamah Agung ('MA') dalam *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 ('M & J Frozen Foods') adalah berguna dan terpakai. Jelas sekali kausa tindakan dan isu di dalam kes *Ranjit Singh* sebenarnya serupa dengan rayuan semasa tetapi MR dalam kes ini berpendapat bahawa keputusan yang mengikat dalam *Ranjit Singh* boleh dibezakan berdasarkan fakta. Perkara kritikal, bahawa tidak ada kontrak sejak awal lagi, adalah ratio recidendi dalam *Ranjit Singh*, nampaknya telah diabaikan oleh MR; dan prinsip inilah yang mengikat MR di bawah doktrin stare decisis dan yang mana perbezaan fakta tidak mengubah prinsip asas tersebut. Selanjutnya, dalam *M & J Frozen Foods*, MA berpendapat bahawa pemilik harta yang dicagar kekal sebagai pemilik dan kepentingan proprietarinya tidak pun dipindahkan pada akhir lelongan. Diputuskan lagi bahawa pemegang cagaran tidak boleh memindahkan hakmilik harta berkenaan kerana ia kekal dengan pemiliknya pada setiap masa. Ini adalah kedudukan yang betul, oleh itu MR telah terkhilaf dalam mengikuti *Malayan United Finance* dan gagal mempertimbangkan keputusan MA dalam *M & J Frozen Foods* (lihat perenggan 24–26, 45 & 61).

(3) Mahkamah menjawab persoalan tersebut secara negatif. Jualan kehakiman menurut s 256 KTN jelas tidak mewujudkan kontrak antara bank pemegang cagaran dan pembida yang berjaya seperti plaintif yang merupakan responden dalam rayuan semasa. Memandangkan fakta bahawa remedi untuk perintah penjualan telah diperuntukkan secara jelas oleh akta, tidak ada sebab atau keperluan untuk menggunakan fiksyen undang-undang kontrak. Pada akhirnya, ini adalah penjualan kehakiman yang dikawal oleh akta dan adalah tidak betul dan tidak munasabah untuk memasukkan penjualan kehakiman ini ke dalam batasan Akta Kontrak 1950. Walau apapun, telah terbukti daripada penelitian hakmilik tersebut bahawa responden adalah pemilik berdaftar dengan hak milik yang tidak boleh disangkal ke atas 94.76 hektar tanah. Ini adalah konsisten dengan apa yang diperintahkan oleh Mahkamah Tinggi dan seperti yang dinyatakan dalam proklamasi jualan. Fakta bahawa hakmilik-hakmilik lain telah dikeluarkan yang seolah-olah menceroboh tanah responden bermakna responden sepatutnya meneruskan remedi yang lain (lihat perenggan 60 & 62–63).]

**Cases referred to**

*Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, SC (refd)

*Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, interveners)* [1992] 1 MLJ 472; [1991] 3 CLJ Rep 75, HC (refd)

A *Lim Beng v AVA Palaniappa Chetty* [1922] 1 FMSLR 764 (refd)
*M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, SC (folld)
*Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317, HC (refd)
B *Mohamed Azmal Noor a/l Naina Mohd Noor v Arab-Malaysian Finance Bhd & Anor* [2003] 4 MLJ 447, CA (refd)
*Ranjit Singh Jarnail Singh v Malayan Banking Bhd* [2014] 7 CLJ 764, CA (refd)
*Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd* [2016] 1 MLJ 165, FC (folld)
C *Santhi a/p Krishnan v Malaysia Building Society Berhad* [2015] MLJU 2116; [2015] 1 CLJ 1099, CA (refd)

**Legislation referred to**

Contracts Act 1950 s 29
D Courts of Judicature Act 1964 s 96(a)
Land Enactment 1911
National Land Code ss 253, 253(1), 256, 257, 258, 269(3), Chapter 3, Form 16F
Rules of Court 2012 O 83

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**Appeal from:** Civil Appeal No B-02(NCvC)(W)-2612–12 of 2018 (Court of Appeal, Putrajaya)

*Vijay Kumar Natarajan (Kee Li Ling and Terrence Teng with him) (Natarajan & Chee) for the appellant.*
F *Porres Royan (Alan Chua Hock Kwang and Geraldine Kenel with him) (Alan Chua & Co) for the respondent.*

**Mary Lim FCJ (delivering judgment of the court):**

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**[1]** The respondent sued the appellant bank for a purported shortfall in the size of the land that it had purchased at a public auction. The claim was dismissed at first instance but allowed on appeal. We reversed the decision of the Court of Appeal upon answering the first question posed on appeal.

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**[2]** The questions posed concern the relationship between a successful bidder in an auction conducted pursuant to an order for sale issued by the High Court, and the bank who initiated the sale, whether these parties are in any contractual relationship upon which the parties may sue for any shortcomings
I that may subsequently arise. These are important questions where the answers should assist and guide parties similarly circumstanced. Orders for sale of immovable properties are unfortunately, commonplace and the clear pronouncement of this apex court should go a substantial way to addressing common concerns.

**[3]** Three questions of law given leave to appeal pursuant to s 96(a) of the Courts of Judicature Act 1964 (Act 91) are as follows:

(a) whether a judicial sale pursuant to s 257 of the National Land Code gives rise to a contract between the chargee bank and a successful bidder;

(b) whether the conditions of sale including the proclamation of sale in particular cl 23 of conditions of sale pursuant to a judicial sale under s 258 of the National Land Code which are formulated by the Chief Registrar of the High Court of Malaya and which have to be strictly adhered to, is contrary to s 29 of the Contracts Act 1950; and

(c) whether in establishing and proving damages, no valuation of the actual land identified as being 'excluded' is necessary or can a plaintiff establish quantum of damages by mere mathematical deduction of acreage.

THE AUCTION

**[4]** The parties in this appeal 'went the distance' insofar as the pleadings are concerned. Apart from the statement of claim and defence, there were the reply, the rejoinder and the surrejoinder.

**[5]** From these extensive pleadings, the respondent's claim pares down to a claim for compensation for breach of contract while the defence is that there is no contract between the parties, and that there was no breach in the conditions of sale. This is how the relationship between the parties started.

**[6]** SAP Holdings Bhd (SAP) were the original registered owners of 94.76 hectares of lands located at Lot 72916, Bandar Selayang, District of Gombak in the State of Selangor Darul Ehsan (subject lands). SAP went into a joint-venture with Cergas Tegas Sdn Bhd (Cergas) to develop the subject lands. Cergas in turn, entered into a loan agreement with the appellant bank (previously known as Arab-Malaysian Finance Bhd) for a facility of RM17m. The subject lands were charged as security for the loan facility. When Cergas defaulted on the loan repayment, the appellant, as chargee, initiated proceedings for a judicial sale of the subject lands by way of a public auction.

**[7]** The respondent's bid of RM120m was accepted at the third auction conducted on 11 November 2016. The reserve price was RM120m. Apparently, there were two earlier unsuccessful auctions which had to be abandoned because the successful bidders failed to pay the balance purchase price.

**[8]** In the case of the respondent, following the acceptance of its bid, the respondent signed the relevant documents and paid the requisite 10% deposit of the reserve price. On 5 June 2017, the respondent was registered as the owner of the subject lands.

**[9]** Sometime in May 2017, the respondent decided to appoint a surveyor to ascertain the actual size of the subject lands. The respondent claimed it was at this point that it learnt that the actual size of the subject lands did not accord with what was stated in the proclamation of sale; that this was because the subject land 'bertindih' or overlapped with five other lots where separate titles had been issued. The relevant lots being:

| Item | Hakmilik Tanah | Tarikh Pendaftaran | Keluasan (Hektar) | Catatan |
|---|---|---|---|---|
| (i) | Lots 3530 GM 876 | 4.03.2002 | 0.8347 | Tanah Pertanian |
| (ii) | PT 35818 HS(D) 35584 | 9.02.2000 | 2.43 | Sekolah Rendah |
| (iii) | PT 35819 HS(D) 35585 | 9.02.2000 | 3.8108 | Sekolah Rendah/ Menengah |
| (iv) | PT 1512 HS(D)58390 | 8.08.2006 | 3.642 | Sekolah Rendah/ Menengah |
| (v) | Tiada hakmilik tetapi disahkan dan telah diluluskan oleh Pejabat Tanah Gombak | – | 2.048 | Sekolah Agama |
| | | JUMLAH = | 12.7655 | Tanah bertindih |

**[10]** It was the respondent's claim that the proclamation of sale held out that the size of the subject lands was 94.76 hectares. However, about 12.7655 hectares of that 94.76 hectares overlapped with five other lots as set out above in which case, the respondent claimed that the appellant was in breach of a material term of contract by not delivering what was contracted or promised.

**[11]** In short, the respondent claimed that it purchased 94.76 hectares but only owned 81.9945 hectares (see para 19(d) of statement of claim at p 371 record of appeal); that there was 13.48% less land than purchased. The respondent thus claimed compensation for loss of land now held under the other five lots, all of which had been issued title save for one lot used for a 'sekolah agama'.

**[12]** The appellant's defence relied primarily on the statutory sale ordered by the court in furtherance of its exercise of rights pursuant to a charge, contending that there was no contract of sale between the parties. The appellant further relied on the relevant conditions of sale which had provided that the subject lands were sold on a 'as-is-where-is' basis and that no misdescription of the land would entitle the respondent to any compensation. According to the appellant, the respondent was in any case required under the terms of sale, to conduct its own investigation and search prior to bidding for the subject lands instead of doing the same long after the completion of the auction. It was suggested that had the respondent physically examined the subject lands, it would have revealed, inter alia, the existence of five schools built thereon.

**[13]** On the issue of prior inspection before bidding at the auction, the respondent claimed that it was prevented from carrying out a physical inspection of the subject lands by the presence of guards or security; that the appellant ought to have conducted a due diligence and obtain a valuation report prior to granting a loan to the borrower, the owner of the subject lands.

DECISION OF THE HIGH COURT

**[14]** After a full trial, the respondent's claim was dismissed with the court finding the claim not proved. The learned judge found that the sale was a 'judicial sale pursuant to an order for sale ('OFS') made by the High Court under the National Land Code ('the NLC'). In obtaining the OFS, the defendants/chargee bank was exercising its statutory rights under the NLC'; that it was settled law that the appellant as the chargee bank was not regarded as a vendor in the sale.

**[15]** In the learned judge's reasonings, 'the fundamental elements necessary under the law of contract for the formation of an enforceable agreement or contract are absent in this case on the facts relating to the present judicial sale by public auction. In short, the defendant never offered any property for sale, not being the vendor, which means that there was no question of the defendant's offer having been accepted by the plaintiff for the formation of a valid contract between them'.

**[16]** Further, the respondent as the purchaser in the judicial sale was bound by the terms in the proclamation of sale; that apart from stating the particulars of title, there was no representation in that proclamation that 'the whole of the 94.76 hectares, without any structures/fixtures of the land was offered for sale'.

**[17]** The High Court also found the appellant not liable to pay compensation for losses arising from a judicial sale quite apart from the fact that the respondent had not proven its loss and damage.

DECISION OF THE COURT OF APPEAL

**[18]** The Court of Appeal disagreed with the High Court on all fronts. The court held that it was settled law that there was a concluded contract between the chargee bank and the respondent as 'the order for sale and the conditions of sale constitute a sale and purchase agreement between the respondent being the chargee bank as the vendor and the appellant being the successful bidder as the purchaser'. The Court of Appeal declined to follow the Federal Court decision in *Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd* [2016] 1 MLJ 165, distinguishing it on the facts; preferring to follow the earlier decisions of *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317; *Mohamed Azmal Noor a/l Naina Mohd Noor v Arab-Malaysian Finance Bhd & Anor* [2003] 4 MLJ 447; *Santhi a/p Krishnan v Malaysia Building Society Berhad* [2015] MLJU 2116; [2015] 1 CLJ 1099; *Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, interveners)* [1992] 1 MLJ 472; [1991] 3 CLJ Rep 75.

**[19]** The Court of Appeal cited paras [20]–[21] of the Federal Court's decision in *Ranjit Singh* to add that 'it can also be a case that had the Court found the order for sale was not set aside, the judicial contract dated 12 September 1990 would be valid and contract was struck. Had a certificate of sale was [sic] issued to the appellant by the court and the certificate of sale was registered, the title or interest of the property would be transferred to the appellant. If there is breach of conditions of sale, the appellant being the registered proprietor of the property could take action against the chargee bank for breached [sic] of terms of the judicial contract'.

**[20]** With that the Court of Appeal then opined that:

> [60] ... In our view the law still stands that in a forced sale pursuant to s 256 of the National Land Code, the respondent being the chargee at whose instance the sale is effected is or is to be regarded as the vendor.

**[21]** The Court of Appeal further held that the learned judge had erred in law in holding that the registered chargee was not liable to pay compensation for losses arising from any judicial sale by public auction by reason of s 269(3) of the National Land Code; taking the view that 's 269(3) does not exempt a chargee from liability for compensation for the losses arising from any judicial sale by public auction'.

**[22]** The Court of Appeal also disagreed with the High Court on the matter of representations, finding the express term in the proclamation of sale on the acreage of the subject lands was breached; that the principle of 'as is where is basis' had no application since the particulars of title in the proclamation of sale relating to the acreage of the subject land did not correspond with the actual acreage. The court further found the principle of caveat emptor had no application to the 'factual matrix of this case'; as well as Condition 23 of the conditions of sale pertaining to easements, caveats, tenancies etc going so far as to suggest that the clause may be contrary to s 296(3) of the National Land Code.

**[23]** Finally, the Court of Appeal awarded RM16,165,681.80 as compensation for not having received the acreage as stated in the proclamation of sale. This sum was calculated by 'way of pro-rating, ie by dividing the purchase price of the said land with the size of the said land'.

OUR DECISION

**[24]** The respondent's claim was founded entirely in contract, hence the nature of the questions posed. The primary issue in this whole appeal is whether a judicial sale pursuant to s 257 of the National Land Code gives rise to a contract between the chargee bank and a successful bidder so as to found/constitute a cause of action. In our view, the answer is clearly and categorically in the negative. Earlier decisions of this court in *Ranjit Singh* and *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 are instructive and of application. Despite these decisions, the Court of Appeal decided otherwise, explaining that the binding decision in *Ranjit Singh* was distinguishable on the facts. The decision in *M & J Frozen Foods Sdn Bhd* was unfortunately, not even considered.

**[25]** First and foremost, while facts may differ as they often do, it must be in relation to the material facts and not just general facts. More importantly, it is the basis of claim and thence the issue in *Ranjit Singh* which should have been the focus of attention. Had that been properly attended to, it would have been readily apparent that the cause of action and issue in *Ranjit Singh* are in fact similar to those presented in this appeal. The plaintiff in *Ranjit Singh* was the successful bidder in an auction conducted pursuant to an order for sale granted by the High Court. He had sued the respondent chargee bank in contract, misrepresentation, negligence and breach of duties, whether contractual, statutory, fiduciary or otherwise. The respondent's claim in this appeal was also against the chargee bank but the cause of action was solely for breach of contract.

**[26]** The claim in *Ranjit Singh* was dismissed by the High Court on the basis

A that there was no contract to begin with. This was affirmed by the Court of Appeal and it was this issue, amongst others, that came up for consideration by the Federal Court. The Federal Court dismissed the appeal and affirmed the decision of the Court of Appeal. This critical point, that there was no contract to begin with, was the ratio decidendi in *Ranjit Singh*, appears to have been B overlooked by the Court of Appeal; and it is this principle that binds the Court of Appeal under the doctrine of stare decisis and for which differences in facts do not alter that fundamental principle.

C **[27]** It is timely that we look at the facts in *Ranjit Singh*. There, the respondent as chargee bank of a piece of land obtained an order for sale by public auction from the High Court at Kuala Lumpur. The auction sale was conducted on 12 September 1990 and the appellant was the successful bidder. Despite paying all sums due under the auction sale, the said land could not be D transferred to the successful bidder as there was a private caveat entered against the said land. On 14 March 1991, the chargor of the said land applied to set aside both the order for sale and the auction sale held on 12 September 1990. The appellant intervened in those proceedings.

E **[28]** On 14 June 1997, the High Court granted both orders sought by the chargor.

**[29]** The respondent bank appealed but was unsuccessful. The Court of Appeal affirmed the decision of the High Court but set aside the order of for F damages to be assessed and to be paid to the chargor and the intervener, and replaced it with an order for a full refund of the purchase price.

**[30]** This led to the intervener suing the chargee bank subsequently, pleading the causes of action alluded to at para [26] above.

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**[31]** After a full trial, the High Court dismissed the appellant's claim holding, inter alia, that there was no contract between the parties for which the Court may pin liability. This is evident from the following paras [10]–[15] of the grounds of decision of the Court of Appeal (see *Ranjit Singh Jarnail Singh* H *v Malayan Banking Bhd* [2014] 7 CLJ 764):

> [10] The appellant contended that the learned judicial commissioner erred in holding that there was no contract between the appellant and the respondent in respect of which it can be said that the respondent was in breach of. The appellant said the learned judicial commissioner had disregarded the fact that in the contract I of sale entered into after the successful auction the respondent bank was described as 'the vendor' ...
>
> [11] We do not agree with the appellant's contentions. We find no merit in them. The learned judicial commissioner was at pains to explain in her judgment that this was not a normal case of a person selling his property as 'vendor' to an interested

'purchaser'. The learned judicial commissioner said this was a case of the respondent exercising its statutory remedy of sale as chargee of the property under the National Land Code. As such it was not correct to describe the respondent as 'vendor' which the appellant was trying to do. We agree with the learned judicial commissioner. The court will always look at the true substance of the transaction and not the badge or term of convenience used by the parties. In our view despite the use of the term 'the vendor' to describe the respondent in the contract of sale, it does not detract in any way from the fact that the respondent had sold the said property as 'chargee'.

**[32]** This opinion was endorsed by the Federal Court on appeal. At para [13] of its judgment, the Federal Court said that: 'the same issues raised before the Court of Appeal was ventilated to us by the appellant. As stated earlier, the Court of Appeal held that there was no contract between the appellant and the chargee bank as the chargee bank was merely enforcing its rights as a chargee by exercising its statutory remedy against the chargor. Before us, it was submitted by learned counsel for the appellant that the judges of the Court of Appeal as well as the trial judge had misdirected themselves in law with regard to the position of a chargee and a purchaser in an auction sale'.

**[33]** The appellant/successful bidder, then urged the Federal Court to regard the chargee bank as the vendor in a forced sale because: 'the chargor had abrogated his rights and powers to dispose the property in the form of a charge when he defaulted on the provision of the charge. Thus, he contended that the term 'vendor' used in the contract of sale to denote the chargee bank was not a mere term of convenience but reflected the actual capacity in which the chargee bank undertook the sale vis a vis the appellant as the purchaser'. The authorities of *Malayan United Finance Bhd*; *Mohamed Azmal Noor*; and *Kuala Lumpur Finance Bhd* were cited in support.

**[34]** The Federal Court declined, holding that 'We are inclined to agree with the position taken by learned counsel for the chargee bank'.

**[35]** Now, we are aware that the term 'judicial contract' was used by the Federal Court to describe the sale by auction. This is evident from the judgment of the Federal Court:

[19] We are inclined to agree with the position taken by learned counsel for the chargee bank. In this case, it is an undisputed fact that the property could not be transferred and registered to the appellant due to the private caveat entered by the daughter of the chargor about two months prior to the appellant having paid the full purchase price. Although a certificate of sale was issued to the appellant by the court, the sale could not be completed. There was a change of circumstances. Since the certificate of sale could not be registered due to the existence of the caveat and would never be capable of being registered until the end, the title or interest of the property still remained with the chargor. Thus, the appellant could not become the registered proprietor of the property not because the chargee bank had breached the

terms of the judicial contract, but because the order for sale was set aside some nine years later. Arguably, there was no breach of contract caused by either party (chargee bank and the appellant bidder) to the condition of sale. In this regard, we agree with the respondent that since the order for sale was set aside, the judicial contract dated 12 September 1990 became null and void, ie no contract was struck between the respondent and the appellant. And the appellant had been put back to his original position, which means his position before the judicial contract took place.

**[36]** This description of the sale as arising from a 'judicial contract' arose for the first time at the Federal Court and we noticed that it emanated from the submissions of the respondent:

> [18] In response, learned counsel for the chargee bank submitted that the so-called contract between the appellant and the chargee bank was a judicial contract which emanated from the order for sale validly granted by the High Court on 15 February 1988. It was argued that since the order for sale was subsequently held to be void by the Court of Appeal the subsequent acts done pursuant to the sale were null and void. Thus, the issue of breach does not arise as there was no contract nor any terms of the contract for the chargee bank to have said to be breached.

**[37]** It is unfortunate that the term 'judicial contract' was used, as the relationship between the parties in the public auction has really nothing to do with entering or making any contract as one is generally familiar with under common law or the Contracts Act of 1950. This is clear from the Court of Appeal's reasoning in that same decision:

> [12] More importantly, we find that the reason the appellant could not become the registered proprietor of the said property was not because the respondent had breached the terms of the alleged 'contract' which was entered into after the successful auction, but because the order for sale was set aside some nine years later, on grounds totally unrelated to the contract of sale entered into after the auction. Therefore the respondent cannot be said to be in breach of contract as alleged.
>
> [13] ...
>
> [15] In our judgment all the appellant's causes of action abovementioned are clearly unsustainable in law.

**[38]** It is evident that the Court of Appeal had referred to the 'contract' in parenthesis, denoting that it was not a concept it was agreeable to or that the court had reservations with it.

**[39]** On our part, we must emphasise that the public auction is a judicial sale of the subject property, judicial as it is ordered by the court after the court is satisfied that the grounds for ordering a sale under the National Land Code have been met. If there are any shortcomings in that sale, the remedy lies elsewhere but not in contract as there is none to begin with.

**[40]** The judicial sale of the property which is subject of the charge was sought for by the chargee bank who was merely enforcing its statutory rights as a chargee when the chargor defaulted or was in breach of the underlying contract between them. Such statutory rights which are available under s 256 of the National Land Code read with O 83 of the Rules of Court 2012 are mandatory and not permissive — see *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805. In pursuing those rights, the chargee does not displace the chargor as owner of the property concerned. At all times, the chargor remains the owner.

**[41]** This was made clear in *M & J Frozen Foods Sdn Bhd*. The Supreme Court speaking through Wan Yahya SCJ, concluded from the authorities examined, that on the issue on the transfer of proprietary rights in a public auction, whether it is 'at the fall of the hammer', that:

> It would appear from the above-cited cases that the vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full — see *Karruppiah Chettiar v Subramaniam* at p 119.

**[42]** Wan Yahya SJC then examined the High Court's decision in *Malayan United Finance*, cited to support the proposition that the chargor is divested of proprietary interest at the fall of the hammer. According to His Lordship, VC George J had 'when dealing with the chargee whom he said should be regarded as a vendor, ... went on to say 'I think I should and I do lay down that the defaulting chargor abdicates his right as registered owner of the land vis a vis selling, in favour of the chargee'. To this, Wan Yahya SCJ opined that the 'passage from VC George J's judgment in *United Finance*'s case appears to have been overstretched beyond the efficacy of its aesthetic language'; adding as follows:

> We do not think that the above expression is intended to lay down the law that in a sale under s 256 of the NLC, the chargor renounces or surrenders all his proprietory rights in favour of the chargee, neither do we contemplate any transfer of such proprietary rights from the chargor to the chargee. The court makes an order for sale at the request of the chargee after the chargor has failed to satisfy the court of the existence of a cause to the contrary. The order provides for certain conditions and procedures to be followed at the sale. The chargee's participation in this instance is only confined to the preparation of the conditions of sale in terms of the order and the production in Court of the issue documents of title — see s 258(2) of the NLC. On the other hand, the chargor is prevented by the court's order from denying the chargee's statutory right of sale, but he may nevertheless exercise his right as a proprietor to dispute any impropriety or anything done in breach of the statutory conditions of sale. In any event, s 267(1)(a) of the NLC, which provides for the passing of the interest in the proprietary right from the chargor to the purchaser would occur on registration and after the issuance of a certificate given under s

259(3)(a), clearly negates any such judicial proposition that the chargor abdicates his proprietary rights at that stage of the auction sales.

**[43]** We share that view. Not only has the passage been 'overstretched', it has been misunderstood and misapplied to describe the parties in the auction or judicial sale as vendor and purchaser and the relevant order for sale and conditions of sale as the sale and purchase agreement when in fact and in law, this is far from being correct.

**[44]** Similar expressions of the relationship between the chargee who initiates an order for sale and the successful bidder as one which is contractual, where the order for sale and the conditions for sale 'were to be regarded as the sale and purchase agreement between the chargee as vendor and the purchaser' are found in the Court of Appeal's decisions in *Mohamed Azmal Noor v Arab-Malaysian Finance*; *Santhi a/p Krishnan v Malaysia Building Society Berhad* and also in *Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, interveners)* [1992] 1 MLJ 472; [1991] 3 CLJ Rep 75. In *Kuala Lumpur Finance*, Lim Beng Choon J, applying *Malayan United Finance Bhd*, took the position that 'Under a forced sale of a land subject to a charge pursuant to s 256 of the National Land Code, the fact that the sale is conducted by the Court or its Registrar does not mean that the Court or its Registrar has an interest in the same or any dispute arising therefrom. The Registrar/licensed auctioneer sells the property as agent of the chargee who is the real vendor'.

**[45]** We disagree respectfully with the view that the chargee bank is to be regarded as owner of the property. The chargor or landowner does not abdicate any part of his ownership in the land to the chargee. As held in *M & J Frozen Foods*, the owner of the charged property remains the owner and his proprietary interest is not even transferred at the fall of the hammer. Whether in the application for the order for sale or subsequently at the auction ordered by the court, the chargee bank is not involved qua vendor or owner; its capacity remains that of a chargee who has successfully obtained an order for sale. The chargee enjoys a specific remedy under s 253 of Chapter 3 of the National Land Code which is the statutory right to an order for sale so as to satisfy the charge in the event of a default or breach of the agreement relating to the charge. As was also pointed out in *M & J Frozen Foods*, the chargee is not capable of passing title of the property concerned as that remains with the owner at all times.

**[46]** In fact, the learned author, Judith Sihombing in *National Land Code — A Commentary* (2019 Desk Edition by Lexis Nexis, Vol 2 p 1219) describes the chargee as merely a 'conduit' or 'the personage' who initiated the sale:

> [1046] Obviously, one benefit for the chargee seeking sale under section 257 and Order 83 (now RC O 83) is that his priority has been protected by registration of

the charge ... An additional factor of importance is that the *chargee is not selling under the Code as owner, instead the Court is ordering the sale and the chargee's role is simply the personage who initiated the sale and who hopes to receive the proceeds of the sale.* (Emphasis added.)

**[47]** When the chargee bank invokes its statutory right of sale, the chargee is only able to sell the charged property in accordance with the terms of s 257 (and the order made by the court) but he cannot pass title of the charged property because it is not its owner. As further explained by Judith Sihombing at para [1014] at p 1206, 'At most, he is merely the conduit for the passing of title to the purchaser in that his application commences the action which results in the sale of the property'.

**[48]** The learned author observed in particular that there have been decisions which have treated the chargee bank as vendor, seeming to equate the chargee as owner of the property when that is clearly not the position in law. The learned author was, of course, referring to the decisions of *Malayan United Finance Bhd* and *Kuala Lumpur Finance Bhd* and she suggested that 'it would seem that the better view is that he is not selling as owner but the land or lease is being sold pursuant to an order for the sale by the court (or in the case of Land Office land the Land Administrator). This sale is supervised by court officials or the Land Administrator ...'.

**[49]** This opinion is correct and is actually borne out when we examine the relevant documents in the judicial sale, namely the proclamation of sale, the memordandum and terms of sale, Borang 16F. All four documents clearly indicate that the subject lands were sold by the Registrar of the High Court, executing the order for sale as granted by the High Court, and not at all by the appellant chargee bank. There is thus no legal or factual basis for the conclusions reached by the Court of Appeal.

**[50]** What seems to have been overlooked is that unlike the particular facts in *Ranjit Singh*, all the cases considered by the Court of Appeal including *Malayan United Finance Bhd* and *Mohamed Azmal Noor* concerned applications or claims by the chargor seeking to prevent the sale whether by reason of non-compliance with the terms of the order for sale or the conditions of sale; or because the order for sale itself was tainted by some invalidity. In *Santhi a/p Krishnan*, the owner was attempting to set aside the order for sale on the basis that the conditions of sale had not been complied with by the successful bidder in which case, it was argued that the memorandum of sale lapsed and became null and void.

**[51]** In all these cases, the actual question concerned the rights and interests of the chargor, whether the owner or chargor could set aside the order for sale,

and whether there was power to extend time for payment of monies due under the auction. Despite the presence of conditions of sale incorporated as part of the terms of the order of court and where there were specific provisions dealing with non-meeting of datelines set, applications for time to pay the balance sum under the auction or judicial sale, abound. In these cases, the applications were granted; and it is in the setting aside of such extensions that the court observed that the applications for extensions of time should not have been allowed in view of the interests of the chargor owner and the terms of the order for sale. And, it was in the rationalising of the power or lack of such power to extend time-lines that the court in these cases likened the arrangements of sale to a contract, how it was important that the affected parties should be in the know, that their consent or positions be made known, and that the terms in the order for sale and the conditions of sale must be adhered to. In the course of these reasonings, the court recognised that the chargor always retained the right to object and to set aside the order for sale, especially where there was non-observance of the terms ordered.

**[52]** This was what actually transpired in *Malayan United Finance Bhd*. The chargee bank had obtained an order for sale for certain land through foreclosure proceedings. When the successful bidder failed to pay the balance purchase price, the bank filed an application for consent of the court to forfeit the 25% deposit that had been paid. Pending the hearing of that application, the successful bidder filed an application to extend the time for paying the balance purchase price. That application was heard and granted on an ex parte basis by the learned senior assistant registrar. When the bank learnt about the extension, quite naturally, it applied to set aside the order.

**[53]** The learned SAR heard and dismissed both applications of the bank. The chargee bank lodged a caveat against any transfer of the land and appealed against both decisions.

**[54]** In allowing both appeals and setting aside the decisions of the learned SAR, Justice VC George (as His Lordship then was) held that 'no variations of the terms of the order or of the conditions of sale may be effected without the consent of the parties'. In explaining why consent of the parties was necessary, His Lordship essentially 'regarded' the order for sale and the conditions of sale as the sale and purchase agreement with the chargee bank further 'regarded' respectively as vendor and the successful bidder, the purchaser.

**[55]** Although His Lordship was well aware that the order of sale was effected under s 253(1), even opining that 'the provisions of this Chapter in the National Land Code (dealing with 'Remedies of Chargees — Sale') shall have effect for the purpose of enabling any chargee to obtain the sale of the land ... to which his charge relates ...'; His Lordship decided to apply Sir Thomas

Braddell CJ's dicta in *Lim Beng v AVA Palaniappa Chetty* [1922] 1 FMSLR 764, 'that the defendant must be regarded as the vendor'. We must therefore examine that decision.

**[56]** In *Lim Beng v AVA Palaniappa Chetty*, Sir Thomas Braddell CJC had ordered a full refund to the plaintiff who had bought land sold by the defendant at an auction despite the defendant knowing that the land was liable to be sold and was in fact sold by the state government for non-payment of quit-rent due. In the result, the plaintiff could not be registered as the owner of the land. Sir Thomas Braddell CJC in this first instance decision agreed with the plaintiff that the chargee defendant 'must be regarded as the vendor and that his position is similar to that of an equitable mortgagee who obtains an order of sale to enforce his charge'. The court held that the defendant was not able to 'make a title to the purchaser free from encumbrances. He had failed to do that by reason of his neglect to clear away the charge of the Government for the rent due in consequence of which the land was sold on the 21 December, ie, nine days before the plaintiff obtained his certificate of title from the officer of the court and the plaintiff was refused registration of the title it having passed from the defendant before the certificate was signed, so that he had paid his purchase money without receiving any consideration for it'.

**[57]** We note from the judgment that the title to the land in question was 'in the defendant'. Under the English system, mortgagees are equated as owner as the land is transferred to the mortgagee. Hence, when the mortgagee exercises its right of sale, it does so as owner and is thus rightly regarded as vendor.

**[58]** But that was in 1915, and the sale was conducted under the Land Enactment of 1911. Today, mortgages are not recognised under the National Land Code, even less the existence and principle of equitable mortgages. See *Role of Equity and the Application of English Land Law in the Malaysian Torrens System* by Teo Keang Sood (Canterbury Law Review Vol 22 2016, p 40). Hence, it was erroneous for the High Court in *Malayan United Finance* to have followed and applied *Lim Beng v AVA Palaniappa Chetty* and regard a chargee as owner and thereby vendor of the charged land. The cases that have followed and applied that view are thus no longer good law.

**[59]** Given that the auction sale of the subject lands in the present appeal, and for that matter in any judicial sale is conducted pursuant to an order of court granted after the court was satisfied that the conditions for such an order had been met, we hold that there is no contract between the chargee bank and the successful bidder. There is no cause or reason to use the concept or legal fiction of contract to describe the relationship of the parties to that judicial sale. As opined by Judith Sihombing at para [1239] at p 1274 in *National Land Code — A Commentary*:

A [1239] The purchaser will have no relationship to the chargee which would entitled the former to pressure the latter to make such payment because there is no contract between the chargee (who is not the vendor of the land but the applicant for the order for sale) with purchaser. Further, the chargee has no control over the proceeds of the sale (as these are held by the court).

B

**[60]** We are therefore of the unanimous view that in relation to the first question, a judicial sale pursuant to s 256 of the National Land Code clearly does not give rise to a contract between the chargee bank and the successful bidder such as the plaintiff who is the respondent in this appeal. Given the fact C that the remedy for an order for sale is expressly provided by statute, there is no reason or need to deploy the legal fiction of a contract. Ultimately, this was a judicial sale governed by statute and it is neither correct nor plausible to fit such a creature of statute into the confines of the Contracts Act 1950.

D

**[61]** For all these reasons, we are of the opinion that *Malayan United Finance* and the Court of Appeal decisions which followed its reasoning in the respect discussed above, are flawed. The correct position is as explained in *M & J Frozen Food Sdn Bhd* and as discussed above. We therefore conclude that the E Court of Appeal erred in following *Malayan United Finance* and in failing to have regard to the Supreme Court decision in *M & J Frozen Food Sdn Bhd*.

**[62]** In any event, it is evident from a perusal of the title that the respondent is now the registered owner with indefeasible title to 94.76 hectares. This is F consistent with what was ordered by the High Court and as set out in the proclamation of sale. The fact that other titles have been issued which seemingly encroached on the respondent's land means that the respondent ought to be pursuing other remedies.

G

**[63]** For all these reasons, we answer question 1 in the negative.

**[64]** It follows from our answer to that question that the respondent's pleaded cause of action was incorrectly premised. The respondent had sought H to fit its claim for compensation solely within the confines of the Contracts Act 1950 but as we have seen, such a cause of action is not tenable.

**[65]** With our views expressed in relation to question 1, the remaining two questions do not warrant any answer. They simply do not arise.

I

**[66]** We therefore allow the appeal and set aside the decision of the Court of Appeal and reinstate the decision of the High Court with costs.

*Appeal allowed with costs; decision of COA set aside; decision of HC reinstated.*

Reported by Dzulqarnain Ab Fatar